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While the court of appeals attempted to balance the government's and contractor's interests, it failed to consider the "risk of an erroneous deprivation of a private interest" through the government's procedures, Transco contends. While the procedures give contractors an "option" of presenting evidence against the suspension, in lieu of a hearing, this "option" is not an opportunity to "confront one's accusers and rebut the charges of fraudulent conduct," Transco observes.

According to Transco, neither the "accuracy nor the legitimacy of due process can be achieved by handing over the process itself to the confined authority of a top level . . . administrative official." The official is immune from any accountability, the company warns. "This is particularly true when, as here, the official is part of the very agency whose action he is reviewing and may be the same individual who took the action in the first instance."

Thus, it is incongruous to conclude that GSA's regulatory procedure affords due process, Transco argues. The court of appeals decision "simply returns control of the entire process to the same administrative official who was incapable, on three separate occasions, of affording due process notice without judicial intervention."

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**FREEDOM OF INFORMATION: JUSTICE DEPT. ANNOUNCES  
NEW POLICY GIVING AGENCIES MORE DISCRETION**

The Justice Department has announced new guidelines for implementing the Freedom of Information Act that emphasize giving individual agencies greater discretion in deciding when to release documents.

Attorney General William French Smith also announced a comprehensive review of the law, noting "various problems" exist in administering the statute, and said Justice would propose amendments.

A memo from Smith to the heads of all executive agencies outlined the Reagan Administration's position on FOIA requests. It replaces a 1977 policy enunciated for the Carter Administration by former Attorney General Griffin Bell.

Smith's memo drops the requirement that an agency must show demonstrable harm would occur if a document were released before the Justice Department will handle that agency's defense. Bell had urged that this criterion be met even if the document in question technically was exempted from release.

Under the revised guidelines, Smith said the Justice Department would not defend an agency that had refused an FOIA request if the agency's denial lacks a substantial legal basis, or if defending the agency's position would present "an unwarranted risk" to other agencies' ability to protect important records.

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"The principal purpose of the new guidelines," Smith said in a separate statement, "is to permit government agencies, consistent with the legal requirements of the act, to fashion their own release policies." Smith said many persons are misusing the law, with the result that informants are reluctant to provide enforcement agencies with leads, foreign governments will not share intelligence, and companies are reluctant to comply with government requests for data.

At the same time, Smith told the agencies they must be guided by the principle that "disclosure of agency records is the foremost goal in administering the act," subject to the exemptions authorized by Congress. The agencies were advised to check with the Justice Department's Office of Legal Policy and Freedom of Information Committee if they believe a particular request might raise a major legal or policy issue.

Smith said the former policy of requiring an agency to show demonstrable harm had increased the complexity of administering the FOIA. He also said it may have increased administrative costs, which were estimated at more than \$45 million annually.

### Legislative Outlook

The Attorney General and the Deputy Attorney General "want to move" on legislative proposals for revising the Act, a justice spokesman told FCR last week. The Act is currently undergoing an "expedited reexamination," with the objective being to get legislative recommendations ready for submittal to Congress.

The Department's proposals are likely to include revisions in the area of procedures for protecting confidential business information submitted by industry. While the government is a "real party in interest" because of its need to obtain the information, it also has an interest in helping submitters and requesters resolve their disputes over disclosure, the spokesman noted.

Thus, the proposals may attempt to clarify Exemption 4 and procedural steps for resolving requests for confidential business data, possibly including ways to involve the submitter in the process.

A bill that would bring additional rights and remedies to submitters (HR 2021) was introduced by Rep. Glenn English (D-OK) earlier this year (871 FCR C-1).

Other areas in which revisions are contemplated include:

-- Requests for law enforcement and intelligence data. The proposals may seek to exempt such items as law enforcement manuals and instructions to investigators (827 FCR A-28). There may be limits on disclosure of law enforcement or intelligence information to foreign nationals, as suggested by recent legislation introduced by Sen. Orrin Hatch (R-Utah) (871 FCR C-1).

-- Reducing the administrative burden. Justice is concerned about the cost of repeatedly litigating the same FOIA issues, and also is interested in ways to assist agencies in releasing non-exempt information.

Justice is also concerned that the Act, which was designed to promote a better informed electorate and increase input to policymakers, has not worked as well as expected, the spokesman indicated. It was envisioned that the primary users of the Act would be the media, historians, and public interest groups, he said. However, the Act has been used as a private discovery vehicle for litigation with the government, and it is being used against the government by "people in prison and people we're trying to put in prison," he noted. The media reporters which the Act envisioned as primary users, now don't make FOIA requests when they need information for a fast-breaking story because the FOIA process moves so slowly, he said. We need to "better service these requesters."

Federal agencies have been asked to provide input on possible legislative recommendations by June 1, the spokesman noted. "I'd be very disappointed if we didn't have legislative proposals by late September-early October," he added, expressing optimism that they could be ready sooner.